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CONSTABLE—ELECTED IN TOWNSHIP WITHIN TERRITORIAL JURISDICTION OF MUNICIPAL COURT—NOT AN OFFICER OF SUCH COURT—PROVISO, UNLESS APPOINTED POLICE CONSTABLE—IN ABSENCE OF SUCH APPOINTMENT COURT MAY NOT UTILIZE SERVICES—BASIS, ALLOWANCE OF FEES—SECTIONS 1611, 3327, 3347, 3348 G.C.

SYLLABUS:

A constable who has been elected under the provisions of Section 3327, General Code, in a township which lies within the territorial jurisdiction of a municipal court is not an officer of such court under the provisions of Section 1611, General Code, unless he has been appointed police constable as provided in Section 3348, General Code; and in the absence of such appointment, such court is not authorized to utilize such of his services as could become the basis of an allowance of fees under the provisions of Section 3347, General Code.

Columbus, Ohio, August 12, 1952

Hon. Marvin E. Young, Prosecuting Attorney
Warren County, Lebanon, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Franklin Municipal Court created by statute by the State Legislature in 1951 has jurisdiction over both the City of Franklin and Franklin Township and by law, the duly elected and qualified constable of Franklin Township takes his case before

The Franklin Municipal Court. The judge of this court in all state cases is paying the fines and costs into the county general fund, subject to the library laws of the General Code.

“Section 1610 of the General Code in part provides under paragraph (F) how the Clerk shall disburse fines and costs, but makes no specific division for the disbursement of costs in a state case.

“Section 3347 sets forth the fees of a constable and makes no exception as to whether or not the cases are before a Justice of the Peace or a Municipal Court.

“Section 3348 states that a police constable paid by the Township Trustees is paid in the Township General Fund.

“My question is as follows: Can the Franklin Municipal Court in state cases pay the costs of duly elected and qualified constable to him and to be retained by him if he is not designated as a police constable and paid by the Township Trustees as provided in Section 3348.”

It may be helpful, at the outset, to make clear the distinction between elected constables and police constables. The former are elected under the provisions of Section 3327, General Code, which reads:

“Such number of constables as directed by the trustees shall be elected, biennially, in each township who shall, each, hold his office for a term of two years, commencing on the first day of January next after his election.”

The general powers and duties of such elected officers are stated in Section 3345, General Code, as follows:

“Constables shall be ministerial officers of the courts held by justices of the peace, in criminal cases, within their respective counties. They shall apprehend and bring to justice felons and disturbers of the peace, suppress riots, and keep and preserve the peace within their respective counties. They may execute all writs and process in criminal cases throughout the county in which they reside, and in which they were elected or appointed. If a person charged with the commission of a crime or offense, flees from justice, any constable of the county wherein such crime or offense was committed, shall pursue and arrest such fugitive from justice, in any other county of the state, and convey such fugitive before any justice of the peace of the county where such crime or offense was committed.”

The appointment of police constables is provided for in Section 3348, General Code, which reads:

“The trustees of a township may designate any qualified person or persons as police constables. The trustees may pay each police constable from the general funds of the township such compensation as the township trustees may by resolution prescribe for the time actually spent in keeping the peace, protecting property and performing their duties as police constables as required by law. Such police constables shall not be paid fees in addition to the compensation allowed by township trustees for services rendered as police constables, but all constable fees provided for by statute, where due for services rendered while the constables performing the same are being compensated as police constables for their performance, shall be paid into the general fund of the township.”

Although it is clear that an elected constable may be appointed police constable under the provisions of this section, I understand your inquiry to relate only to an elected constable who has not been so appointed.

The status of the office of constable within the territory in which a municipal court exercises jurisdiction was considered in my Informal Opinion No. 75, dated November 7, 1951. In that opinion, after noting that one of the provisions of Section 1584, General Code, had the effect of terminating the jurisdiction of justices of the peace within such territory, I stated:

“In specific answer to your question, therefore, it is my opinion that the enactment of Amended Senate Bill No. 14, commonly known as the Municipal Court Act, although abolishing the office of constable appointed by a justice of the peace pursuant to Section 3331, General Code, and abolishing the duties of all constables as ministerial officers of justices' courts and their fees resulting therefrom does not abolish the office of an elected constable or affect the right of the township trustees, pursuant to Section 3348, General Code, to designate any such elected constable as police constable and to pay such police constable for the performance of such duties from the general funds of the township.”

This conclusion is not, of course, dispositive of the question at hand for the reason that the words “fees resulting therefrom” obviously refer to “duties * * * as ministerial officers of justices' courts.” Accordingly, because the schedule of fees provided by Section 3347, General Code,

does not appear to be limited to services performed as officers of justices' courts, we may properly first inquire to what extent, if any, constables are authorized to perform in a municipal court any of the services set out in such schedule.

In Section 13432-9, General Code, we find the following provision:

"When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in Section 1 of this chapter, but if the offense charged is a violation of the ordinance or regulation of a municipal corporation, such process shall be directed to and executed by the officers of such corporation."

The words "Section 1 of this chapter" clearly refer to Section 13432-1, General Code, which reads:

"A sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer, herein designated as 'peace officers' shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained.

"A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of a law of this state or an ordinance of a village, until a warrant can be obtained."

The word "magistrate," as used in Section 13432-9, supra, is defined in Section 13422-1, General Code, which reads:

"For the purpose of this title, the word 'magistrate' shall be held to include justices of the peace, police judges or justices, mayors of municipal corporations and judges of other courts inferior to the court of common pleas. * * *"

Here we might suppose, since the Franklin Municipal Court is a court inferior to the Court of Common Pleas, that the judge of such court is authorized to direct a warrant to an elected constable for the arrest of a person charged with a violation of state law; and that such constable may lawfully execute such warrant.

That the fees provided in Section 3347, supra, are not applicable solely to services performed in relation to a justice's court was the conclusion of one of my predecessors in Opinion No. 1407, Opinions of the Attorney General for 1930, page 95, the syllabus of which reads:

"1. By virtue of the provisions of Section 13432-9 of the General Code, the mayor of a village may legally issue a warrant of arrest directed to a sheriff, deputy sheriff or constable if the offense is a violation of the state laws.

"2. The fees provided by Section 2845 of the General Code for the services of a sheriff and deputy sheriff, and the fees provided in Section 3347 for a constable in serving warrants directed to them by a mayor of a village, in state cases, may be legally taxed and collected from defendants, and such fees may be paid to these officers. However, the fees so collected by a sheriff or deputy sheriff must be paid into the general fund of the county."

In this view of the application of Section 3347, supra, we might properly conclude that to the extent that an elected constable is authorized by law to perform in a municipal court any of the services listed in such section, such court may properly allow the payment to him of the fees therein provided.

It is by no means clear, however, that the performance of any of such services in a municipal court are authorized by law. Despite the general provision as to the execution of warrants, already noted in Section 13432-9, we are required to give effect to the special statutory provision on this subject in the municipal court act. The final paragraph of Section 1603, General Code, reads:

"* * * All warrants, executions, subpoenas, writs, and processes in all criminal and quasi-criminal cases may be issued to the bailiff of the court, a police officer of the appropriate municipality, or to the sheriff of the appropriate county."

We must further consider the effect of such special provision on the general provision, noted above in Section 3345, General Code, with respect to the authority of elected constables to "execute all writs and process in criminal cases within the county."

In the enumeration in Section 1603, supra, of the several officers to whom warrants, executions, etc., may be issued, there is found a clear implication that such warrants, etc., may not be issued to any police officers other than those named.

This view of the matter finds some support in the provisions of paragraph (D) of Section 1611, General Code, which reads:

“Every police officer of any municipality or police constable of a township within the territory shall be ex-officio a deputy bailiff of the municipal court in and for the municipality or township within which he is commissioned as such police officer or police constable, and shall perform such duties in respect to cases within his jurisdiction as may be required of him by a judge of said court or by the clerk or bailiff or deputy bailiffs thereof, without additional compensation. In any township which is entirely within the territory of the court, the trustees may appoint police constables, who shall receive such compensation out of the township general funds as the trustees by resolution may prescribe for the time actually spent in keeping the peace, protecting property and performing their duties as police constables, and as ex-officio deputy bailiffs of the municipal court within the township.”

Here a clear and specific provision is made to meet the need of a municipal court for the services of a police officer in any township within the court's jurisdiction. It is to be presumed that the General Assembly, at the time of this enactment, was aware of the distinction between the office of elected constable and that of police constable. In this situation the express provisions of a special nature included in the municipal court act defining the status of the latter with relation to the court, and the failure to mention the former in this connection, are strongly indicative of a legislative intent that a municipal court should not be authorized to utilize the services of elected constables as such, and I conclude that such was the effect of this enactment.

At this point we may observe that, with a single exception hereinafter noted, the fees provided in Section 3347, supra, are based on (1) serving and making return of certain designated orders or writs, (2) attending criminal or civil trials, amounts expended for transportation, meals and lodging of prisoners, and the moving or storage of goods and the care of animals taken on legal process, (3) summoning and swearing appraisers, (4) advertising property for sale, and (5) taking and making return of any bond required by law. It is obvious that none of these services could be performed by a constable in the absence of an order of the court directing such performance. If, therefore, a municipal court is not authorized to utilize the services of elected constables in any of these

respects, it follows that such officers would have no basis upon which to assert a claim, under the provisions of Section 3347, General Code, for fees in municipal court proceedings.

There is, however, in Section 3347, *supra*, provision for payment of a fee to an elected constable for :

“* * * attending criminal case during trial or hearing and including having charge of prisoner or prisoners, each case, two dollars and fifty cents, but when so acting shall not be entitled to a witness fee if called upon to testify * * *.”

It is plain from this language that in such cases the elected constable is present in court in a capacity as a ministerial officer of the court and that his duties as such include custody of the accused. It does not appear, however, that an elected constable could ever perform such service in a municipal court. As already indicated herein, the only officers authorized to act as ministerial officers of a municipal court are the bailiffs designated in Section 1611, General Code; and, although police constables may act as such bailiff, elected constables, as such, can not. Moreover, in the first paragraph of subsection (E), Section 1611, General Code, we find the following provision :

“The bailiff and deputy bailiffs shall, in addition to other duties, perform for the municipal court services similar to those performed by the sheriff for the courts of common pleas, and shall perform such other duties as may be requested by rule of court.”

This provision clearly indicates that any prisoners present in a municipal court for trial will be in the custody of the court's bailiff, rather than in the custody, for instance, of an elected constable who may have effected the arrest of such prisoner on view.

In your inquiry you have indicated that the elected constable in Franklin Township “takes his cases before the Franklin Municipal Court.” As already noted herein, an elected constable, under the provisions of Section 3345, *supra*, is under a duty to “apprehend and bring to justice felons and disturbers of the peace, suppress riots, and keep and preserve the peace.” It is assumed, therefore, that such cases as the constable “takes before the Franklin Municipal Court” are those in which arrests are made without the prior issue of a warrant of arrest, and in which the arresting officer has delivered his prisoner either to the city jail or to the

bailiff of the court. Here, then, is an instance in which the statute has imposed a duty on a public officer without providing any compensation therefor, but such a situation is by no means unknown to the law. It is well settled in Ohio that the right of a public officer to be compensated for his services is purely statutory and can not rest on implication. 32 Ohio Jurisprudence, 1011, Section 152.

Accordingly, for the reasons hereinbefore indicated, it is my opinion that a constable who has been elected under the provisions of Section 3327, General Code, in a township which lies within the territorial jurisdiction of a municipal court is not an officer of such court under the provisions of Section 1611, General Code, unless he has been appointed police constable as provided in Section 3348, General Code; and in the absence of such appointment, such court is not authorized to utilize such of his services as could become the basis of an allowance of fees under the provisions of Section 3347, General Code.

Respectfully,

C. WILLIAM O'NEILL
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